STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
25 TUDOR ASSOCIATES	:	DECISION DTA No. 809350
for a Revision of a Determination or for Refund of Real Property Transfer Gains Tax under Article 31-B of the Tax Law for the Year 1989.	:	

Petitioner 25 Tudor Associates, c/o Time Equities, 55 Fifth Avenue, New York, New York 10003 filed an exception to the amended order of the Administrative Law Judge issued on September 12, 1991 dismissing its petition for revision of a determination or for refund of real property transfer gains tax under Article 31-B of the Tax Law for the year 1989, pursuant to 20 NYCRR 3000.5(b)(1)(v) and (vii), on the grounds that petitioner has failed to timely file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination. Petitioner appeared by Ziegler, Sagal & Winters, P.C. (Stephen S. Ziegler, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Both parties filed letters in lieu of briefs on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation has the authority to issue a Notice of Determination for Real Property Transfer Gains Tax on the sale of shares of a cooperative corporation prior to completion of the cooperative plan.

II. Whether the proof offered by the Division of Taxation regarding the mailing of the Notice of Determination is sufficient to establish the date that the notice was mailed by the Division of

Taxation so as to commence the running of the 90-day period in which the taxpayer must challenge the assessment.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. The Administrative LawJudge's findings of fact and the modified finding of fact are set forth below.

On June 25, 1990, the Division of Taxation (hereinafter the "Division") issued a Notice of Determination to petitioner, 25 Tudor Associates, for Real Property Gains Tax under Article 31-B of the Tax Law, in the amount $31,040.00.

The notice specified, in part, that:

> "Any disagreement previously submitted for the Statement of Proposed Audit Changes cannot be considered a disagreement with this notice. You must file A Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 09/23/90."

The Division submitted into evidence an affidavit of Mary K. Randolph, Head Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the New York State Department of Taxation and Finance. CARTS is the Department's computer system for generating, among other things, notices of determination to taxpayers with assessed gains tax delinquencies. Ms. Randolph's duties include supervising the mailing of notices of determination and maintaining certified mail records. Ms. Randolph explained the procedure by which notices are generated and issued. She indicated that "[a]fter reviewing [the Notice of Determination and the certified mail record], I am certain that the Notice of Determination which is the subject of this case was issued and mailed on June 25, 1990."

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> Attached to the affidavit of Mary K. Randolph, as Exhibit "A," were copies of two "certified mail record" pages. The first page contained the following information which was printed at the top of the page:

"PAGE : 3
REPORT ID: CD0110R1
DATE : 6/14/90
TIME : 01:37:22"

This page listed a Notice of Determination with a notice number L 001667403 and the corresponding taxpayer name and address, 25 Tudor Associates, c/o Time Equities Inc. at 55 5th Avenue, New York, New York. Ms. Randolph stated in her affidavit that the remaining names on this page were redacted to preserve the confidentiality of information relating to other taxpayers. No postmark is evident on this page.

The second page submitted with Ms. Randolph's affidavit appears to be the final page of a certified mail report. This page states the total number of deficiency notices (145) contained in the report and the total amount of postage and fees. All of the information pertaining to the deficiency notices listed on this page had also been redacted other than the applicable postage amount. This page contained a circular stamp dated June 25, 1990, with a signature next to the stamp. This page was marked as "PAGE 14." Printed on this page was the same "REPORT ID" (CD0110R1), "DATE" (6/14/90), and "TIME" (01:37:22), as listed on PAGE 3. However, the printed "14" in the date was manually crossed out, with a "25" written in. There was no reason offered by the Division for this manual correction.

Ms. Randolph states in her affidavit these two pages are from the same certified mail report, and that the stamp on "PAGE 14" is a United States Postmark indicating the date in which all of the notices listed in this report were received by the United States Postal Service on June 25, 1990. Ms. Randolph also testified that it is the Division's procedure to have a United States Postal representative verify that (s)he has received a properly addressed envelope for each name on the certified mail record and then affix his or her signature and/or a United States Postmark to a page of the certified mailing record.[1]

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[1]The Administrative Law Judge's original finding of fact "4" read as follows:

"Attached to the affidavit of Mary K. Randolph, as Exhibit "A," was a copy of a certified mail record which indicated that a Notice of Determination, notice number L 001667403, was sent by certified mail to 25 Tudor Associates, c/o Time Equities Inc. at 55 5th Avenue, New York, New York, with a U.S. Postal Service postmark of June 25, 1990. This address precisely matches the address and the notice number on the Notice of Determination issued to petitioner."

We modified this fact to more fully reflect the record.

In response to the Notice of Determination, petitioner sent a Request for a Conciliation Conference to the Bureau of Conciliation and Mediation Services ("BCMS"). A copy of the envelope which contained this request was submitted with the Division's "Notice of Motion to Dismiss Petition." This envelope bears a machine metered postmark dated October 31, 1990. By an Order dated December 21, 1990, BCMS dismissed the request as late filed, since the time period between the issuance of the notice (June 25, 1990) and the date the request was received (November 5, 1990) was in excess of 90 days.

On March 18, 1991, the Division of Tax Appeals received from petitioner a petition for revision of the determination. Petitioner alleged that the request for a conciliation conference was timely filed. In addition the petition asserts, in part, that:

> "Tax Law § 1444(3) provides that the statute of limitations with respect to transfers made pursuant to a cooperative plan does not begin to run until the date of the last transfer under such plan. ...Tax Law § 1444(3) indicates that the Legislature intended that there should be no final determination with respect to transfers pursuant to a cooperative plan until such time as all of the transfers made pursuant to such plan are completed."[2]

By Notice of Motion, dated May 23, 1991, the Division sought dismissal of the petition based upon petitioner's failure to file a request for conference or petition for hearing within 90 days of the issuance of the Notice of Determination.

OPINION

In the determination below, the Administrative Law Judge granted a motion made by the Division to dismiss the petition by petitioner requesting a conciliation conference. Specifically, the Administrative Law Judge held that petitioner failed to file a request for conference or petition for hearing within 90 days of the issuance of the Notice of Determination in accordance with Tax Law § 1444(1).

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[2]It is noted that Tax Law § 1444(3) relates to the statute of limitations for assessment of real property gains tax under Article 31-B of the Tax Law. However, this does not affect the 90-day time period for filing a petition with the Division of Tax Appeals since there can be no extension of that 90-day time limitation (Tax Law § 170.3-a[b]).

Petitioner appeals this order on two grounds. First, petitioner argues that because the gains tax requires gain on a cooperative conversion to be determined by aggregating the consideration and original purchase price for the sale of all the units in the conversion, the Division is precluded from issuing a Notice of Determination until all of the cooperative units have been sold. Petitioner contends that because the Notice of Determination was issued prior to the sale of all of the cooperative shares, the assessment was premature and, thus, invalid. Petitioner also contends that even if the Division had the ability to assess a tax deficiency prior to the sale of all of the shares, the Division failed to prove that the Notice of Determination was issued in accordance with the statutory requirements.

In response, the Division contends that: 1) because petitioner received the Notice of Determination, this fact corroborates the Division's affidavit that its mailing procedure was proper; 2) the unexplained handwritten correction contained in the Division's mailing records does not render the affidavit of the Division mailing personnel inaccurate or unreliable; and 3) petitioner's failure to indicate the date the notice was received warrants the inference that the date of receipt would corroborate the June 25, 1990 mailing date contained in the Division's mailing records. Finally, the Division contends that petitioner's position that an assessment for taxes due on a sale of cooperative shares may not be issued until all of the shares are sold is contrary to statutory authority.

We reverse the order of the Administrative Law Judge.

First, we reject petitioner's contention that the Division was without authority to issue a Notice of Determination in this case.

As the Division notes, Tax Law § 1442 provides, in pertinent part, that:

> "(a) General. The tax imposed by this article shall be paid . . . no later that the fifteenth day after the day of transfer.
>
> "(b) Cooperative or condominium plan or partial or successive transfer. In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred."

These statutory provisions make it clear that the gains tax is required to be paid as the shares relating to individual cooperative units are transferred, even though the tax is ultimately computed on the overall cooperative conversion (see, Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316).

Further, section 1444 of the Tax Law provides, in relevant part, that:

> "[i]f a form required by this article is not filed, or if a form when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such records or information as may be obtainable . . . . Notice of such determination shall be given to the person liable for the payment of the tax."

In the instant case, according to petitioner, the Division issued a Notice of Determination in order to disallow certain expenses deducted by petitioner in calculating the gain subject to tax on a cooperative conversion (see, petitioner's statement to request conciliation conference). In our view, this is an appropriate instance in which to issue a Notice of Determination under the provisions of section 1444 because the Division is asserting that the forms filed by petitioner paying tax on the cooperative unit sales were incorrect or insufficient, i.e., petitioner is deducting costs that the Division contends are not allowable. We are further persuaded that this is the correct result because petitioner's interpretation of the law would render the Division with no power to control the payment of gains tax on cooperative and condominium plans until all of the units in a plan were sold. We conclude that the Legislature did not intend the requirement that tax be paid on the transfer of each unit to be meaningless, and, therefore, the Division had the authority to issue a notice of determination in this case.

Next we address the issue of whether the Notice of Determination was validly issued. Tax Law § 1444(1) requires that, in order for a taxpayer to challenge the determination, a petition must be submitted to the Division of Tax Appeals within 90 days after "the giving of notice of such determination" (Tax Law § 1444[1]). "Giving of notice" is not defined under Article 31-B. However, this term is defined within other articles of the Tax Law as the date upon which the Notice of Determination is mailed (see, e.g., Tax Law § 1147[a][1]).

Where the Division presents evidence that a Notice of Determination was properly mailed, a presumption arises that the notice was received by the taxpayer to whom it was addressed (see, MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111). Proper mailing may be established by a showing that the Notice of Determination was sent by certified or registered mail to the taxpayer's last known address (Tax Law § 681[a]).[3]

In this case, petitioner does not deny that the Notice of Determination was received. Moreover, it is apparent from petitioner's inclusion of the Notice of Determination as an exhibit to its petition that the notice was received by petitioner. Thus, the sole factual determination to be made is whether the Division has established the date that the notice was mailed. This date will commence the running of the 90-day period in which petitioner must file a petition (see, Tax Law § 1444[1]). If this date cannot be established, then the commencement of the 90-day period cannot be ascertained, and petitioner's petition will be deemed timely (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The date of mailing may be proven by establishing the standard procedure for the issuance of such notice by one with knowledge of such procedures, and the production of evidence to show that this procedure was followed in the particular case at hand (Matter of Novar TV & Air Conditioner Sales & Serv., supra).

In an effort to establish the standard procedure for issuing a Notice of Determination, the Division submitted the affidavit of Division employee Mary K. Randolph, who supervises the mailing of the notices of determination. Ms. Randolph describes the Division's mailing procedures as follows: A Notice of Determination is generated which contains a "certified control number." This number (as well as the taxpayer's name and address) is then recorded in a certified mail record. The certified mail record and the corresponding notices of determination

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[3]However, it has been held that the failure to meet one of these requirements of mailing will not invalidate the assessment so long as the taxpayer receives the notice within the three year statutory period for issuing an assessment (Matter of Agosto v. State Tax Commn., 68 NY2d 891, 508 NYS2d 934, revg 118 AD2d 894, 499 NYS2d 457 [assessment sent to address other than taxpayer's last known address]).

are then received by Ms. Randolph (however, the affidavit does not indicate what procedures, if any, she performs with the record and the notices). The notices are then placed in envelopes and delivered along with the certified mail record to the United States Postal Service. A postal service representative verifies that (s)he has received a properly addressed envelope for each name on the certified mail record and then affixes his or her signature and/or a United States postmark to a page of the certified mail record.

In an attempt to prove that the Notice of Determination was mailed to petitioner on June 25, 1990, the Division submitted two pages from a certified mail record. The first sheet, marked as "page 3," lists the Notice of Determination addressed to petitioner. There is no postmark apparent on this sheet. The second sheet, "page 14," appears to be the final page of a certified mail record. This sheet contains a postmark dated June 25, 1990. Both pages list the following printed information: "REPORT ID: CD0110R1; DATE: 6/14/90; TIME: 01:37:22"; however, the date on the second sheet has been manually altered to read "6/25/90." By submitting these pages, the Division asks us to assume that when a certified mail record is generated, it is always delivered to the postal service complete and unaltered with the corresponding notices listed therein. Further, the Division's evidence requires us to assume that the multi-page mail record is maintained by the Division unaltered and intact until certain pages are copied to be introduced into evidence.

We conclude, as we did in Matter of Katz (Tax Appeals Tribunal, November 14, 1991), issued after the Administrative Law Judge's determination in this matter, that the direct evidence of mailing offered here is not sufficient, in itself, to establish that the Division mailed the notice on the date claimed. What is missing here, as it was in Katz, is any evidence allowing us to determine that the relevant page of the purported certified mailing record was in fact attached to the page bearing the postmark at the time the document was delivered to the postal service. Although the Randolph affidavit describes, in part, the process by which the Division generates the certified mail record, it offers no description of the process by which the Division ensures

that the multi-page document generated is the same one ultimately delivered to the postal service and then returned to the Division. In our view, if the Division has elected to abandon the use of a document complete on one page bearing a postmark and the signature of a postal service employee (i.e, Postal Form 3877) as its direct evidence of mailing, then it must provide us with additional information that allows us to determine that the relevant page of the computer-generated, multi-page certified mailing record was in fact delivered to the postal service with the postmarked page. One form that this additional information could take would be a description of office practice suited to the new form of direct evidence -- an articulated procedure employed by the Division to ensure that the integrity of the certified mail record is maintained from the time that the document is generated, delivered to the postal service and returned to the custody of the Division.

The absence of such an articulated procedure renders meaningless, for our purposes, the statement in the Randolph affidavit that the two pages entered into evidence are a "true and accurate copy of two pages from the certified mail record of Notices of Determination and other Notices mailed on June 25, 1990 by the Department of Taxation" (Affidavit of Mary K. Randolph). Without any information in the record for us to determine the basis of Ms. Randolph's statement, we conclude that the statement does not provide direct evidence that the Division physically deposited the notice with the postal service on the date claimed (Matter of Novar TV & Air Conditioner Sales & Serv., supra).

Since we conclude that the Division has not established the date on which it mailed the Notice of Determination, petitioner's petition must be deemed timely (Matter of Novar TV & Air Conditioner Sales & Serv., supra).

Because the result of our decision is to provide petitioner with a hearing, we find it unnecessary to consider whether petitioner would be entitled to file a claim for a refund for the amounts assessed after the sales pursuant to the cooperative plan were completed.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of 25 Tudor Associates is granted; and

2. The order of the Administrative Law Judge is reversed and this matter is remanded for a hearing on the merits.

DATED: Troy, New York
June 18, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner